No. 80.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

SCRIPTO, INC.,
Appellant,

v.

DALE CARSON, as Sheriff of Duval County, Florida, et al.,
Appellees.

On Appeal from the Supreme Court of the State of Florida.

BRIEF FOR THE APPELLANT.

ERNEST P. ROGERS,
GEORGE B. HALEY, JR.,
1045 Hurt Building,
Atlanta 3, Georgia,
Counsel for Appellant.

Of Counsel:
SMITH, KILPATRICK, CODY, ROGERS
& McCLATCHEY,
1045 Hurt Building,
Atlanta 3, Georgia,
DAVISSON F. DUNLAP,
ADAIR, ULMER, MURCHISON, KENT
& ASHBY,
1215 Barnett Bank Building,
Jacksonville 2, Florida.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

TABLE OF CITATIONS.

Cases:

Statutes:

Miscellaneous:

No. 80.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

SCRIPTO, INC.,
Appellant,

v.

DALE CARSON, as Sheriff of Duval County, Florida, et al.,
Appellees.

On Appeal from the Supreme Court of the State of Florida.

BRIEF FOR THE APPELLANT.

OPINION BELOW.

The opinion of the Supreme Court of the State of Florida is reported officially in 105 So. 2d 775. The final decree of the Circuit Court of Duval County, Florida, is not reported. The opinion of the Supreme Court of Florida (R. 30), the judgment of that court (R. 42), and the final decree of the Circuit Court of Duval County (R. 24), are printed in the record.

JURISDICTION.

This suit was brought by the appellant in the Circuit Court of Duval County, Florida, to enjoin the collection from appellant of a use tax assessed by the State Comp-

troller pursuant to Chapter 212, Florida Statutes, on the ground that said statute, if construed to make appellant liable for collection of such tax, violates the commerce clause of Article I, Section 8, and the due process clause of Amendment XIV of the Constitution of the United States, and is, therefore, invalid (R. 6-7). The Circuit Court construed the statute to impose such liability on appellant, sustained the validity of the statute as thus construed and applied, and denied appellant the relief sought (R. 24-26). The Supreme Court of Florida, on October 17, 1958, affirmed the judgment of the Circuit Court, and on December 3, 1958 denied appellant's petition for rehearing (R. 42-43). Appellant, on February 28, 1959, filed in the Supreme Court of Florida its notice of appeal to the Supreme Court of the United States (R. 45). By order dated April 21, 1959, a Justice of the Supreme Court of Florida, pursuant to Rule 13 of this Court, granted an extension of time until and including the 29th day of May, 1959, within which to file the record and docket this case on appeal to the Supreme Court (R. 45). The case was docketed in this Court on May 27, 1959, and the Court noted probable jurisdiction on October 12, 1959 (R. 48).

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257 (2).

STATUTE INVOLVED.

The statute which is involved, and the validity of which, as construed and applied in this case, is challenged by appellant, is Chapter 212, Florida Statutes, known as the Florida Sales and Use Tax Law (Florida Revenue Act of 1949, as amended through the year 1956). That statute is lengthy, and it is, therefore, set out in Appendix A hereto. The opinion and judgment of the Supreme Court of Florida is based primarily upon that court's interpreta-

tion of Section 212.06 (2) (g) of that statute which requires a "dealer" to collect the use tax, and defines the term "dealer" as follows:

> "'Dealer' also means and includes every person who solicits business either by representatives or by the distribution of catalogs or other advertising matter and by reason thereof receives and accepts orders from consumers in the state, and such dealer shall collect the tax imposed by this chapter from the purchaser . . ."

QUESTIONS PRESENTED.

1. Whether Chapter 212, Florida Statutes, and particularly Section 212.06 (2) (g) thereof, is repugnant to the commerce clause, Article I, Section 8, of the Constitution of the United States, in that said statute, as construed and applied in this case, requires a non-resident seller engaged in no intrastate business or activity in connection with its sales to Florida consumers, to register as a dealer and to collect and remit a use tax to that state on merchandise sold exclusively in interstate commerce to such consumers on orders solicited by independent brokers.

2. Whether Chapter 212, Florida Statutes, and particularly Section 212.06 (2) (g) thereof, is repugnant to the due process clause of Amendment XIV to the Constitution of the United States, in that said statute, as construed and applied in this case, requires a non-resident seller to collect and remit a use tax to the State of Florida on merchandise sold to Florida consumers not by reason of any local business or activity of the seller in that state, but solely as a result of orders solicited by independent brokers who are not subject to the direction or control of the seller.

STATEMENT OF THE CASE.

A. Proceedings Below.

Appellant, a Georgia corporation with its principal office and place of business in the City of Atlanta, Georgia, brought this action in the Circuit Court of Duval County, Florida, against the Comptroller of that state and the Sheriff of that county, to enjoin a threatened attachment of certain accounts receivable of appellant for the satisfaction of use taxes which had been assessed against appellant by the Comptroller. Appellant prayed in that suit that the court would declare and decree that the assessment of such taxes against appellant by the Comptroller was illegal and invalid (R. 1, 7).

For the sake of clarification, at this point it should be noted that two separate and distinct types of transactions by appellant were involved in the state court, but only one of those transactions is involved on this appeal (R. 31). Appellant manufactures at its plant in Atlanta, Georgia, mechanical writing instruments which it sells to independent wholesalers throughout the United States, including the State of Florida. With those writing instruments, it distributes to the wholesalers a metal container to display the writing instruments for sale. Both the writing instruments and the display container are subsequently resold by the wholesaler to retail dealers who in turn retain the display container and sell the merchandise therefrom (R. 31). Such wholesalers are not the same persons as the advertising specialty brokers referred to hereinafter in connection with appellant's Adgif sales, and no question is involved on this appeal concerning the use tax consequences of any of the foregoing transactions. As a separate part of its business, appellant sells through Adgif Company, which is a division of appellant, mechanical writing instruments with advertising material printed

thereon, directly to consumers on orders solicited by independent advertising specialty brokers (R. 32). It is with respect to these Adgif sales that the validity of the Florida Sales and Use Tax Law is questioned.

In Paragraph XI of its original complaint, appellant alleged that if the Florida statute be construed and applied so as to require appellant to register as a "dealer" and to collect and remit a use tax on its Adgif sales, then the statute imposes an unreasonable burden upon interstate commerce, and deprives appellant of its property without due process of law (R. 6-7). The parties stipulated the material facts involved in the case (R. 13). The Circuit Court after consideration of the same and hearing argument thereon, on December 13, 1957, entered a final decree in which it construed the Florida statute to require appellant to register as a dealer and to collect and remit the use tax arising out of its Adgif sales, sustained the validity of the statute as thus construed and applied, and denied the prayers of appellant's complaint with respect thereto (R. 24-26).

Appellant appealed to the Supreme Court of Florida, and specifically assigned error upon the finding of the trial court in Paragraph 3 of its final decree that the Florida statute as thus construed and applied does not violate the commerce clause or the due process clause of the United States Constitution (R. 28-29). The Supreme Court of Florida, on October 17, 1958, entered its judgment affirming the judgment of the Circuit Court (R. 42), and filed its opinion in which it ruled that appellant is a "dealer" within the contemplation of Section 212.06 (2) (g), and that the Florida statute so construed does not contravene the commerce clause or the due process clause of the Constitution of the United States (R. 30, 38, 42).

Appellant, within the time provided by law, filed its petition for rehearing in the Supreme Court of Florida,

and on December 3, 1958, that court denied such petition for rehearing (R. 43). Appellant, on February 28, 1959, filed in that court its notice of appeal to the Supreme Court of the United States (R. 45).

B. The Stipulated Facts.

The material facts in this case appear in the stipulation by the parties (R. 13, et seq.). Appellant's manufacturing plant and principal office and place of business is located in Atlanta, Georgia, where it is incorporated (R. 13, 14). There it manufactures mechanical writing instruments for sale throughout the United States, including Florida (R. 14). The only sales involved in this appeal, however, are those which appellant makes through its advertising specialty division, known as Adgif Company. Adgif is not a separate corporation from appellant, but maintains a separate office in Atlanta at which it is engaged exclusively in selling mechanical writing instruments, manufactured by appellant, with advertising matter imprinted thereon (R. 15). Since Adgif sales are made to Florida residents for their use or consumption (R. 16), there is no question that Florida is entitled to tax such use. The sole question is whether appellant can be required to register as a dealer and to collect such tax, and remit it to the State of Florida.

Neither appellant nor its Adgif division has qualified as a foreign corporation to do business in the State of Florida; neither owns, leases, or maintains in that state any office, distributing house, salesroom, warehouse, or other place of business; neither owns or maintains in that state any bank account, stock of merchandise, or any other property (R. 14, 15, 17, 31, 33). Appellant employs a salesman who resides in Jacksonville, but that salesman does not solicit orders for Adgif products, nor does he in any way aid, assist or have any connection whatsoever with

Adgif sales or distribution (R. 14, 16, 32). The sole function of that salesman is to solicit orders for appellant's regular line of products which are not sold through Adgif Company, and which are sold for resale. No orders for Adgif products are received from customers in the State of Florida by reason of solicitation or other activities of that salesman (R. 17). The Circuit Court found, and the Supreme Court of Florida agreed, that the presence and activity of such salesman does not make appellant a "dealer" as to Adgif sales, as the term dealer is defined in the Florida statute, but that appellant is a "dealer" solely because of the solicitation of Adgif orders by independent brokers, as hereinafter described (R. 24, 37-38).

Appellant has no employee or agent in the State of Florida who has anything to do with Adgif sales (R. 16, 17). Orders for Adgif products are solicited by independent advertising specialty brokers (sometimes referred to by the Supreme Court of Florida as "jobbers" or "wholesalers") who are residents of Florida (R. 16). Appellant, through Adgif Company, has a written agreement with each of those brokers by which it is agreed that Adgif will pay a certain commission on all orders taken by the broker in a described territory; that Adgif reserves the right to reject any and all orders; that the broker is an independent contractor and shall not hold himself out as an employee or agent of Adgif nor make any collections nor incur any debts involving Adgif (Stip. Ex. C; R. 16, 19). The agreement requires nothing affirmative of the broker; he is not required to solicit for Adgif alone, and no specified volume of Adgif orders is required by him. The agreement contemplates no control whatever over the broker by appellant or Adgif. The broker becomes "inactive" if he has not submitted any orders for sixty days, but the only consequence of such inactivity is loss of commissions on repeat orders received directly from customers (R. 19). The Florida brokers who solicit orders for Adgif

products do in fact deal in the products of other manufacturers as well (R. 32).

Orders for Adgif products solicited by such independent brokers are sent directly to the home office of Adgif in Atlanta, Georgia, for acceptance or refusal, as provided by the terms and conditions printed on the order form (Stip. Ex. D.; R. 16, 21). If the order is accepted by Adgif, the sale is consummated by shipment of the merchandise in interstate commerce, f. o. b. Atlanta, title passing to the purchaser at that time (R. 16, 21). Payment for the merchandise is made by the customer directly to Adgif in Atlanta on such terms as may be agreed upon between them (R. 16). The broker makes no collections or deliveries for Adgif (Stip. Ex. C; R. 16, 19).

The Supreme Court of Florida agreed with appellant that the only activity in the State of Florida relevant to the power of the state to compel appellant to register and collect the use tax is the solicitation of orders for Adgif products by the independent advertising specialty brokers (R. 38). But contrary to the contentions of appellant, the court ruled that such solicitation activity made appellant a "dealer" required to collect the use tax under Section 212.06 (2) (g) of the Florida statute, and held that the statute as thus construed and applied to appellant is a valid exercise by the State of Florida of its taxing power (R. 38, 42).

SUMMARY OF ARGUMENT.

I. Construction of the Statute.

The Supreme Court of Florida ruled that appellant is a "dealer" within the meaning of the statute, not by reason of any activity of appellant or its employees in the state, but solely because independent Florida brokers solicit orders for Adgif products. That interpretation of the statute is conclusive upon this Court. **Armour Packing Company v. B. R. Lacy,** 1906, 200 U. S. 226, 26 S. Ct. 232, 50 L. ed. 451, and **State of Alabama v. King & Boozer,** 1941, 314 U. S. 1, 62 S. Ct. 43, 86 L. ed. 3. Consequently, the only issue before this Court is whether the commerce clause and the due process clause protect appellant against being compelled to serve as a state tax collector for a state from which it derives no benefit or protection, and in which it is not present.

II. Commerce Clause.

A. The requirement of the Florida statute that appellant register as a dealer and perform all of the resulting duties, including collection of the use tax, as a condition precedent to its right to make interstate sales to Florida consumers, is a direct and therefore prohibited exaction on the privilege of engaging in interstate commerce. **Nippert v. City of Richmond,** 1946, 327 U. S. 416, 66 S. Ct. 586, 90 L. ed. 760. But, even if the incidence of the statute on appellant's interstate business be indirect, the statute as applied to appellant is nevertheless invalid because its burden is unreasonable in that it is not based upon any intrastate activity of appellant nor upon any need of the State of Florida to collect its taxes in this manner. See **Freeman v. Hewit,** 1946, 329 U. S. 249, 252-253, 67 S. Ct. 274, 277, 91 L. ed. 265.

B. The Florida statute by its express terms and its probable application discriminates against interstate commerce by imposing upon out-of-state sellers duties and penalties which are not imposed upon sellers who are residents of the State of Florida. **Memphis Steam Laundry Cleaner, Inc. v. Stone**, 1952, 342 U. S. 389, 72 S. Ct. 424, 96 L. ed. 436.

III. Due Process Clause.

The only local activity in Florida related to appellant's Adgif sales is the solicitation activity of independent advertising specialty brokers who are not directed or controlled in any way by appellant, and who solicit orders for other manufacturers as well as for appellant. Under these circumstances, there is insufficient connection between the State of Florida and appellant to give the State of Florida jurisdiction to make appellant a tax collector. **Miller Bros. Co. v. State of Maryland**, 1954, 347 U. S. 340, 74 S. Ct. 535, 98 L. ed. 744.

ARGUMENT.

I.

The Construction Given the Florida Statute by the Supreme Court of That State Is Conclusive Upon and Not Subject to Review by This Court.

Both the Circuit Court and the Supreme Court of Florida held that appellant is a "dealer" within the meaning of Chapter 212, Florida Statutes, Section 212.06 (2) (g) not by reason of the presence or activity of appellant's employee-salesman, but solely because of the solicitation of Adgif orders by independent advertising specialty brokers (R. 25, 37-38). Such construction of the Florida statute by the highest court of that state is conclusive upon this Court, and presents to this Court for review the single question of whether the Florida statute as thus construed and applied is repugnant to either the commerce clause or the due process clause of the Constitution of the United States. **Armour Packing Company v. B. R. Lacy**, 1906, 200 U. S. 226, 26 S. Ct. 232, 50 L. ed. 451; **Crew Levick Company v. Commonwealth of Pennsylvania**, 1917, 245 U. S. 292, 38 S. Ct. 126, 62 L. ed. 295; **State of Wisconsin v. J. C. Penney Co.**, 1940, 311 U. S. 435, 443, 61 S. Ct. 246, 249, 85 L. ed. 267; **State of Alabama v. King & Boozer**, 1941, 314 U. S. 1, 62 S. Ct. 43, 86 L. ed. 3.

II.

The Florida Statute, as Construed and Applied in This Case, Imposes a Prohibited Burden on Interstate Commerce by Requiring That Appellant Register as a Dealer, and Collect and Remit a Use Tax on Merchandise Sold Exclusively in Interstate Commerce to Florida Consumers on Orders Solicited by Independent Brokers.

A. The statute imposes a direct and unreasonable burden on the interstate business of appellant.

The Supreme Court of Florida emphasized that we are not in this case concerned with the Florida sales tax, but that the instant case involves only an effort to collect the Florida use tax (R. 35). Appellant does not dispute that statement or finding, nor does appellant question the constitutional authority of the State of Florida to tax the use by its citizens of property from whatever source such property may have been derived. Appellant does question in this case, however, the power of the State of Florida to deny to appellant its constitutional right to do interstate business, unaided by any local activity of appellant, unless it first register with the Comptroller of the State of Florida as a dealer, pay a registration fee, furnish a cash or property bond on the request of the Comptroller, collect the use tax from its customers in the State of Florida, remit the tax to the Comptroller, and subject itself to the duty to keep detailed records, and submit to periodic audit.

The Supreme Court of Florida has had some difficulty in this and in other cases in deciding what is the nature or character of its sales and use tax. In this case, the court said that "a sales tax is a form of excise tax imposed on an ultimate consumer for the exercise of the privilege of purchasing property," and that "a use tax, which is the one here involved, is levied on the privilege of using, storing or consuming property" (R. 35). In

Gaulden v. Kirk, 1950, 47 So. 2d 567, 573, the court had "no difficulty in declaring it to be the express legislative intent that this tax is a privilege or occupation tax, and the subject of taxation or the thing taxed is the privilege of engaging in business within the State of Florida." Later, in holding that a vendor is not liable to the State of Florida for sales tax receipts collected by him but stolen from him without fault on his part, the court said:

> "There is an ambiguity as to whether the tax is levied on the vendor or the vendee, but it is clear that the law requires the vendor to bear the amount of the tax. The seller is required to collect it from the buyer. The buyer is liable for it. We conclude that it is a tax against the buyer. The seller is coerced to collect the tax and remit. To say that it is a tax on the seller is overcome by the fact that he is required to exact it of the purchaser. The spirit and intent of the law is that the purchaser and not the seller shall pay it." **Spencer v. Mero**, 1951, 52 So. 2d 679, 680.

Regardless, however, of whether the incidence of the Florida sales and use tax is upon the seller or the buyer, the statute is clear that the economic burden of paying either the sales tax or the use tax is to be ultimately borne by the buyer, but that the economic burden of collecting and remitting either tax is to be upon the seller, and that the statutory justification for such imposition on both the seller and the buyer is the privilege which the seller enjoys of doing business in the state, and the privilege which the purchaser enjoys of owning property in the state. Section 212.05 of the Florida Statutes declares it "to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state . . . or who stores for use or consumption in this state any item or article of tangible personal property . . . For the exercise of such privilege, a tax is levied as follows: (2) At

the rate of three per cent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed or stored for use or consumption in this state; . . . (5) The said tax shall be collected from the dealer as defined herein and paid at the time and in the manner as hereinafter provided. . . ."

Section 212.06 repeats the statement that the tax shall be collectible from all dealers, and then proceeds to define the term "dealer". Among the definitions of dealer is that contained in subparagraph (2) (g) of that section within which definition the court below held that appellant falls:

> " 'Dealer' also means and includes every person who solicits business either by representatives or by the distribution of catalogs or other advertising matter and by reason thereof receives and accepts orders from consumers in the state, and such dealer shall collect the tax imposed by this chapter from the purchaser and no action either in law or in equity on a sale or transaction as provided by the terms of this chapter may be had in this state by any such dealer unless it be affirmatively shown that the provisions of this chapter have been fully complied with."

Section 212.07 again refers to the tax as a "privilege tax," and requires that dealers as far as practicable add the amount of the tax imposed under the statute to the sales price, and collect it from the purchaser; and further provides that any dealer who fails or refuses to collect the tax from the purchaser shall be liable for and pay the tax himself, and in addition shall be guilty of a misdemeanor. Section 212.12 (10) provides that "the dealer, or person charged herein, is required to pay a **privilege tax** of three per cent of the total of his gross sales of tangible personal property . . . and such person or dealer shall add three per cent to the price . . . and collect the

total sum from the purchaser . . . or consumer." (Emphasis added.)

Section 212.18 (3) requires that "every person desiring to engage in or conduct business as a dealer as defined in this chapter," shall apply for a certificate of registration, and that the application shall be accompanied by a registration fee of $1.00. Engaging in business as a dealer without such certificate first had and obtained is prohibited. Section 212.14 (4) authorizes the Comptroller in his discretion to require a cash deposit, bond or other security as a condition to a person obtaining or retaining a dealer's permit, and Section 212.151 requires a seller who has not qualified to do business in the state to designate with the Comptroller an agent for service of process. Section 212.13 requires each dealer, as defined in this Chapter, to maintain detailed records of his sales for a period of two years, and provides that such records shall be open for inspection by the Comptroller at all reasonable hours.

Whatever the incidence of the use tax itself, it is clear from the foregoing statutory provisions that exactions more onerous than a tax are imposed directly on the seller for the privilege of selling tangible personalty to consumers in the state. Where a seller, like appellant, makes such sales exclusively in interstate commerce, unaided by any intrastate activity, then the burden of the exaction is directly on such interstate commerce for the privilege of engaging therein. The fact that the exaction takes not the form of a tax but the form of making appellant a tax collector is immaterial in the eyes of the commerce clause. As this Court has said, "It would be a strange law that would make appellant more vulnerable to liability for another's tax than to a tax on itself." **Miller Bros. Co. v. State of Maryland**, 1954, 347 U. S. 340, 346, 74 S. Ct. 535, 539, 98 L. ed. 744. What makes the exaction invalid is not the fact that appellant must add three per cent to the cost of its products, but the "fact that there is interference

by a State with the freedom of interstate commerce." **Freeman v. Hewit**, 1946, 329 U. S. 249, 256-257, 67 S. Ct. 274, 279, 91 L. ed. 265.

The requirement of the Florida statute that appellant, as a condition precedent to the exercise of its right to sell to Florida consumers, must apply for a registration certificate, pay a registration fee, designate a process agent, possibly post a bond, and agree to act as tax collector, is precisely the sort of direct imposition or prior restraint on interstate commerce which this Court has consistently ruled invalid. **Nippert v. City of Richmond**, 1946, 327 U. S. 416, 66 S. Ct. 586, 90 L. ed. 760; **Spector Motor Service, Inc., v. O'Connor**, 1951, 340 U. S. 602, 71 S. Ct. 508, 95 L. ed. 573; **Railway Express Agency, Inc., v. Commonwealth of Virginia**, 1954, 347 U. S. 359, 74 S. Ct. 558, 98 L. ed. 757.

Even if the Court should be of the opinion, however, that the Florida statute does not impose a direct exaction on the privilege of engaging in interstate commerce, but that the burden on commerce is only indirect, the statute as applied to appellant is nevertheless invalid because its burden is unreasonable in that it is not fixed upon any intrastate activity of appellant, and is not founded upon any real need of the State of Florida. In the case of indirect or insubstantial burdens upon interstate commerce, this Court has followed a policy of weighing the deterrent effect upon commerce against the need of the state which gave rise to the tax or regulation, and against the benefits derived by the interstate business from its local activities related to its business. As the Court said in **Freeman v. Hewit**, 1946, 329 U. S. 249, 252-253, 67 S. Ct. 274, 277, 91 L. ed. 265:

> "A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense. But, in the necessary accommodation

between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. . . . State taxation falling on interstate commerce, on the other hand, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. . . ."

This Court has never held that a state has the power to burden an interstate sale with a tax, or the seller with the duty of collecting the tax, nor to reach beyond its borders to collect such tax, unless the seller is present in the state and engages in some activity there in aid of the interstate sale. In **Nelson v. Sears, Roebuck & Co.**, 1941, 312 U. S. 359, 364, 61 S. Ct. 586, 588, 589, 85 L. ed. 888, the Court upheld a state's requirement that a seller collect the use tax on both its intrastate and its interstate sales, because the seller owned retail stores in the state, had qualified to do business there, and failed to establish that there was no connection between its local retail business and its interstate sales. Cf. **Norton Co. v. Department of Revenue of Illinois**, 1951, 340 U. S. 534, 71 S. Ct. 377, 95 L. ed. 517. In **General Trading Co. v. State Tax Comm.**, 1944, 322 U. S. 335, 64 S. Ct. 1028, 88 L. ed. 1309, the Court found that regular entry of the seller's employees into the taxing state to solicit orders justified imposition on the seller of the burden of collecting the use tax on sales resulting from the orders thus solicited. In those cases the seller was required to carry a burden which arose out of and was proportionate to the protection and benefit received from the state with respect to a regular, though limited, local activity of the seller.

Appellant has not qualified as a foreign corporation to do business in the State of Florida; it does not own, lease, or maintain in that state any office, distributing house

salesroom, warehouse or other place of business; it does not own or maintain in the State of Florida any bank account, stock or merchandise or any other property. Orders for appellant's Adgif products are solicited by ten independent advertising specialty brokers who are residents of Florida. Appellant exercises no control whatever over such brokers, and they solicit orders for other manufacturers as well as for appellant. Orders for Adgif products solicited by such independent brokers are sent directly to the home office of Adgif in Atlanta, Georgia, for acceptance or refusal. If the order is accepted by Adgif, the sale is consummated by shipment of the merchandise in interstate commerce, f. o. b. Atlanta, title passing to the purchaser at that time. Payment for the merchandise is made by the customer directly to Adgif in Atlanta on such terms as may be agreed upon. The independent broker makes no collections or deliveries for Adgif. Thus, the only activity carried on in the State of Florida in connection with the Adgif sales of appellant is the activity of independent contractors, Florida businesses which may be, and presumably are, required to bear their fair share of taxes for the benefits which they derive from the state, and which may be required to collect the use tax from the Adgif customers and to remit such tax to the state. For the State of Florida to have the power to make a tax collector of appellant under these circumstances would require a compelling demonstration that such power is essential to the proper administration of the state's use tax, and that appellant's interstate business is not suppressed or unduly burdened thereby. The Court said in **Nippert v. City of Richmond**, 1946, 327 U. S. 416, 423-424, 66 S. Ct. 586, 590, 90 L. ed. 760:

> " . . . This is not to say that the presence of so-called local incidents is irrelevant. On the contrary, the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone;

and even substantial connections, in an economic sense, have been held inadequate to support the local tax. But beyond the presence of a sufficient connection in a due process or 'jurisdictional' sense, whether or not a 'local incident' related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce. . . ."

The State of Florida has no interest involved in the imposition of this tax collection duty on appellant which is equal or superior to the interest of appellant in being free from restraint in the pursuit of its interstate activities. The state can require the ten independent brokers who solicit orders for appellant and others to collect the use tax on sales which result from their solicitation efforts. By the terms of Section 212.06 (2) (h) of the Florida statute, it is specifically contemplated that such an independent solicitor for an out-of-state concern might be required to register as a dealer and to collect the use tax. The Comptroller has issued a regulation requiring "brokers and salesmen" to qualify as dealers, and collect the tax "unless the out-of-state company for whom they work will assume the obligation . . ." CCH, All State Sales Tax Reporter, Par. 30-560.18. Furthermore, the consumers who purchase Adgif products are themselves Florida businesses which are required by Section 212.06 (2) (c) and (d) of the statute to pay the tax to the state if appellant is not required to do so (R. 16). Appellant's contract of sales specifically states that state taxes "where applicable, are to be paid by the purchaser" (Stip. Ex. D; R. 21). The State of Florida will, therefore, not lose any tax or indeed be put to any significant additional cost or trouble in collecting its tax by reason of appellant's interstate immunity.

The burden on appellant, on the other hand, as the result of being required to act as a tax collector for the State of

Florida, is great. It must register as a dealer, and thus submit to the jurisdiction of the State of Florida; it must designate an agent for service of process upon it in the state, or else service of process upon the Secretary of State will be deemed to be sufficient service of process upon appellant. If appellant refuses to register as a dealer and to collect the tax, it is subjected to criminal penalties, and denied access to the courts of the state to enforce obligations owed it. If the Comptroller sees fit, he may require that appellant furnish a cash or collateral bond to guarantee the payment of the taxes which it collects. It must maintain an accounting and bookkeeping staff to keep track of use taxes collected for this and thirty-two other states, as well as for many municipalities and counties which have now resorted to such revenue measures. P-H, All States Tax Guide, Par. 92,970; CCH, All State Sales Tax Reporter, Par. 301. Rates of tax, exemptions, requirements for registration, time and manner of filing returns, record keeping and other administrative requirements vary from state to state, from locality to locality, all of which further complicates the administrative burden imposed upon appellant. Then appellant must preserve the records which it keeps, and open its books to the multitude of tax officials for review and audit. In the case of Florida, under the statute as amended in 1959, it must in addition reimburse the state for the necessary travel and per diem expense of the State Comptroller involved in making such audits. Section 212.13 (2), as amended by S. D. 923, Fla. Laws, 1959.

Appellant submits that the burden thus imposed on it as a tax collecter for the State of Florida is beyond all proportion to any benefit which the State of Florida receives from requiring such tax collection by appellant, and bears no relation to any benefit which appellant receives from the State of Florida, since appellant engages in no activity in that state in connection with its Adgif sales.

B. **The statute discriminates against interstate commerce.**

It is the contention of the State of Florida, and the general theory of use taxation, that the use tax is a "protective measure for the benefit of retail merchants in the taxing state who would be placed at a competitive disadvantage as against shipments in interstate commerce from a non-taxing state" if the out-of-state vendor were not required to collect the tax (R. 35). In practical operation, however, the requirement that out-of-state vendors collect a use tax on their interstate sales imposes a discriminatory burden upon interstate commerce which is not imposed upon competing local business. Such discrimination is forbidden by the commerce clause. **Nippert v. City of Richmond,** 1946, 327 U. S. 416, 423-424, 66 S. Ct. 586, 590, 90 L. ed. 760; **Memphis Steam Laundry Cleaner, Inc., v. Stone,** 1952, 342 U. S. 389, 72 S. Ct. 424, 96 L. ed. 436.

The Florida statute contains some provisions which are on their face discriminatory against out-of-state vendors, and other provisions which obviously in their practical application will likely prove discriminatory against such vendors. The definition of "dealer" in Section 212.06 (2) (g) of the statute, which definition was held by the Supreme Court of Florida to encompass appellant, is obviously designed to apply primarily to out-of-state vendors who sell their goods in interstate commerce. Dealers, as defined in that section, and only such dealers, are denied access to the courts of Florida to enforce obligations arising out of any sales to Florida consumers "unless it be affirmatively shown that the provisions of this chapter have been fully complied with." A local dealer who should through oversight or otherwise fail to collect the sales tax from a purchaser, or otherwise fail to comply with the statute, would simply himself be liable for the payment of the tax and incur no other penalty. But, an out-of-state vendor, as a condition precedent to maintaining an action

on a Florida account would be required to show that it had collected and remitted all use taxes on all sales made to consumers in Florida. Section 212.14 (4) gives to the Comptroller the authority to require a cash deposit, bond or other security as a condition precedent to the issuance of a dealer's permit. Obviously, the Comptroller is more likely to require such bond or deposit in the case of an out-of-state vendor who has no property, office or place of business in the State of Florida, than he is in the case of a local vendor. The statute, as amended in 1959, clearly discriminates against out-of-state vendors having no office or place of business in Florida by requiring such vendors to reimburse the state for the necessary travel and per diem required to make periodic audits of the vendor's records maintained outside the state. S. B. 923, Fla. Laws, 1959.

In summary, the Florida statute as applied to appellant is a direct exaction imposed on the privilege of engaging solely in interstate commerce. Furthermore, the burden imposed on appellant as an out-of-state vendor is not justified by any local activity or incident related to its interstate business nor by any need of the state to collect its taxes in this manner. Moreover, the statute in several respects discriminates against interstate commerce. Therefore, the statute is necessarily invalid.

III.

The Florida Statute as Construed and Applied in This Case Deprives Appellant of Its Property Without Due Process of Law by Requiring It to Collect and Remit a Use Tax to the State of Florida on Merchandise Sold to Florida Consumers Solely as the Result of Orders Solicited by Independent Brokers, and Not by Reason of Any Local Business or Activity of Appellant in That State.

The construction placed upon the Florida statute by the Supreme Court of that state authorizes the state to project

its powers beyond its boundaries and make a tax collector of a foreign corporation which is not present in the state due to ownership of any property or any business activity conducted there. It is true that the Court has held that very limited activity by a foreign corporation in a state will permit that state to subject the corporation to the jurisdiction of its courts, to impose a tax on the corporation, and to make a tax collector of the corporation, if the obligation imposed by the state arises out of or is connected with the activities of the corporation within the state. **International Shoe Company v. State of Washington,** 1945, 326 U. S. 310, 66 S. Ct. 154, 90 L. ed. 95; **General Trading Company v. State Tax Comm.,** 1944, 322 U. S. 335, 64 S. Ct. 1028, 88 L. ed. 1309.

But the Court has never held that a state has jurisdiction to impose an obligation upon a foreign corporation if that corporation engages in no activity whatever in the state giving rise to the obligation. To the contrary, the Court has consistently recognized that "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." **Miller Bros. Co. v. State of Maryland,** 1954, 347 U. S. 340, 344-345, 74 S. Ct. 535, 539, 98 L. ed. 744. See also **Nippert v. City of Richmond,** 1946, 327 U. S. 416, 424, 66 S. Ct. 586, 590, 90 L. ed. 760. The Court has recently reaffirmed that for a foreign corporation be subject to the taxing jurisdiction of a state the corporation must engage in activities within the state which "form a sufficient nexus between such a tax and transactions within a state for which the tax is an exaction." **Northwestern States Portland Cement Company v. State of Minnesota,** 1959, 355 U. S. 911, 79 S. Ct. 357, 365-366, 2 L. ed. 2d 272.

In the **Miller Bros.** case, 347 U. S. 340, the Court held that even regular deliveries of a substantial quantity of merchandise by the out-of-state vendor in its own vehicles

within the taxing state was not a sufficient connection to subject the out-of-state vendor to the tax jurisdiction of the state. Appellant engages in no activity whatever in the State of Florida related to its Adgif sales. The only local activity in Florida in connection with such sales is the solicitation activity of independent advertising specialty brokers who are not directed or controlled in any way by appellant, who represent other manufacturers as well as appellant, who make no collections or deliveries, and whose sole authority is to solicit orders for appellant's products which orders are subject to acceptance or rejection by appellant at its office outside the State of Florida. This is not a case of an out-of-state vendor doing business through a general local agent who is controlled and directed by, and devotes his full time to, his principal, and who regularly makes local deliveries of his principal's merchandise, which was the situation in **Felt & Tarrant Mfg. Co. v. Gallagher**, 1939, 306 U. S. 62, 59 S. Ct. 376, 83 L. ed. 488, a use tax case, and in **McGoldrick v. A. H. DuGrenier, Inc.**, 1940, 309 U. S. 70, 60 S. Ct. 404, 84 L. ed. 584, a sales tax case. In those cases, the out-of-state vendor had entered and was present in the taxing state because of the presence of the general agent who conducted the vendor's business exclusively in the state in the same manner and to the same extent as a branch office staffed by employees of the vendor would have done. The vendor in those cases had even greater jurisdictional contact with the taxing state than did the vendor in **General Trading Co. v. State Tax Comm.**, 1944, 322 U. S. 335, 64 S. Ct. 1028, 88 L. ed. 1309.

The Congress of the United States has recently recognized by statute that for purposes of state income taxation a foreign corporation is not doing business in a state by reason of solicitation of orders there on its behalf by an independent broker. Section 101, Title I, Public Law 86-272, 73 Stat. 555 provides in part as follows:

"(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) For purposes of this section—

(1) the term 'independent contractor' means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term 'representative' does not include an independent contractor."

The portion of the Act of Congress above quoted is merely declaratory of existing law. This Court has consistently held that a foreign corporation is not subject to the jurisdiction of the courts of a state by reason of local activities on its behalf by a resident independent contractor, even though the resident may be a wholly owned subsidiary of the non-resident. **Bank of America v. Whitney Central National Bank**, 1923, 261 U. S. 171, 43 S. Ct. 311, 67 L. ed. 594; **Cannon Mfg. Co. v. Cudahy Packing Co.**, 1925, 267 U. S. 333, 45 S. Ct. 250, 69 L. ed. 634; **Consolidated Textile Corporation v. Gregory**, 1933, 289 U. S. 85, 53 S. Ct. 529, 77 L. ed. 1047. The Supreme Court of Florida has also ruled that service of process

upon a resident independent broker is not sufficient to subject one of the foreign corporations which the broker represents to the jurisdiction of the Florida courts where the foreign corporation has no resident employee or place of business, and is itself engaging in no activity in the state. **Mason et al. v. Mason Products Co.**, 1954, 67 So. 2d 762; **Atlantic & Gulf Grocery Co. v. Aetna Mills Co.**, 1919, 80 So. 738. The foregoing decisions are relevant and support appellant's position that the Florida statute is invalid as applied to appellant, because a state's jurisdiction to tax is substantially co-extensive with the jurisdiction of its courts. **International Shoe Co. v. State of Washington**, 1945, 326 U. S. 310, 66 S. Ct. 154, 90 L. ed. 95.

There is a real need for this Court to call a halt to the progressive tendency on the part of the various states to expand their taxing power beyond their borders through the guise of taxing a local use. At least thirty-three states and many municipalities now have use taxes. P-H, All States Tax Guide, Par. 92,973; CCH, All State Sales Tax Reporter, Par. 301. As Prentice-Hall has put it:

> "Observe the progressive stages of tax collection liability. First it needed a place of business to confer jurisdiction. Then a regular agent or representative in the state, equivalent to a business place under General Trading . . . and Felt & Tarrant . . . Then other (presumably equivalent) sales activity (Maryland). This is gradually being extended, by statutory effort, to related acts like advertising for sales (Ark., D. C., Fla., Ga., Md., Miss., R. I., S. C.), sales by catalog (Fla., Ga., Md., N. D., S. C., Tenn.), and similar sales promotional activities. So, also, the act of delivery is now being seized upon by the states as a legitimate toehold (Ark., Maine, Md., Miss., R. I., Wash., W. Va.). In fact, laws in Arkansas and Maine make vehicles a 'place of business.' Even mail

order sales are in the clutch (Ark., R. I.)." P-H, All States Tax Guide, Par. 92,970.

Encouraged by the decision of its Supreme Court in this case, the State of Florida by a 1959 amendment to Section 212.06 (2) (g) of the statute has further expanded the definition of "dealer" to include "every person who solicits business either by **direct representatives, indirect representatives, manufacturers agents,** or by the distribution of catalogs or other advertising matter or **by any means whatsoever** . . ." (Emphasized words added by S. B. 917, Fla. Laws, 1959.) The statute as thus amended would presumably require a non-resident who solicits business from Florida consumers by interstate telephone calls to register as a dealer and collect the use tax.

The states in their zeal to collect additional revenue are not only ignoring traditional concepts of jurisdiction to tax, but are prone to apply different concepts in different cases where necessary to sustain the validity of the tax. Compare **Topps Garment Manufacturing Corp. v. State of Maryland,** 1957, 212 Md. 23, 128 A. 2d 595 (Md.), with **W. J. Dickey & Sons, Inc., v. State Tax Commission of Maryland,** 1957, 212 Md. 607, 131 A. 2d 277 (Md.); also compare **People v. West Pub. Co.,** 1950, 35 C. 2d 80, 216 P. 2d 441 (Calif.), with **Irvine Co. v. McColgan,** 1945, 26 C. 2d 160, 157 P. 2d 847 (Calif.).

The case now before the Court offers an opportunity for the Court to draw the line at **General Trading Co. v. State Tax Comm.,** 1944, 322 U. S. 335, 64 S. Ct. 1028, 88 L. ed. 1309, and to tell the states plainly that beyond the minimum jurisdictional contact present in that case, i. e., solicitation of orders by employee-salesmen, they may not go without violating the commerce and due process clauses of the Constitution of the United States. Florida has clearly overstepped that line in this case.

CONCLUSION.

Chapter 212, Florida Statutes, and particularly Section 212.01 (2) (g) thereof, as construed and applied by the Supreme Court of Florida to the facts in this case, is repugnant to both the commerce clause and the due process clause of the Constitution of the United States. The judgment of the Supreme Court of Florida is, therefore, erroneous and should be reversed.

Respectfully submitted,

ERNEST P. ROGERS,

GEORGE B. HALEY, JR.,
1045 Hurt Building,
Atlanta 3, Georgia,
Counsel for Appellant.

Of Counsel:

SMITH, KILPATRICK, CODY, ROGERS
& McCLATCHEY,
1045 Hurt Building,
Atlanta 3, Georgia,

DAVISSON F. DUNLAP,
ADAIR, ULMER, MURCHISON,
KENT & ASHBY,
1215 Barnett Bank Building,
Jacksonville 2, Florida.